

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1445

Cir. Ct. No. 2015CV9644

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

AMALGA COMPOSITES, INC.,

PLAINTIFF-APPELLANT,

V.

**LABOR INDUSTRY REVIEW COMMISSION AND
NEFRI GOMEZ-SANDOVAL,**

DEFENDANTS-RESPONDENTS.

APPEAL from order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Reversed and remanded with directions.*

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Amalga Composites, Inc. (“Amalga”) appeals from an order of the trial court affirming a decision of the Labor and Industry Review Commission (“LIRC”). LIRC affirmed the decision of the Administrative Law

Judge (“ALJ”) who held that Nefri S. Gomez-Sandoval (“Gomez-Sandoval”) was entitled to back pay for Amalga’s unreasonable refusal to rehire her following a work-related injury. Gomez-Sandoval was released to full duty work on December 12, 2012. However, Amalga, her employer, did not return her to work until July 29, 2013. Gomez-Sandoval sought back wages for the period between December 12, 2012 and July 28, 2013, under WIS. STAT. § 102.35(3) (Worker’s Compensation unreasonable refusal to rehire).¹

¶2 Amalga argues that Gomez-Sandoval’s claim for benefits pursuant to WIS. STAT. § 102.35(3) is barred as a matter of law because payment of back wages would violate federal immigration policy as expressed in the Immigration Reform and Control Act of 1986 (the “Immigration Act”) because Gomez-Sandoval is an undocumented worker. On appeal, Amalga does not challenge LIRC’s findings that Amalga unreasonably refused to rehire Gomez-Sandoval following her work-related injury in violation of WIS. STAT. § 102.35(3). Rather, citing Wisconsin and federal case law, Amalga argues that it could not rehire Gomez-Sandoval because she was an undocumented worker pursuant to the Immigration Act and that the Supremacy Clause of the United States Constitution² and the Immigration Act bar Gomez-Sandoval’s claim for back wages (collectively the “Immigration Act issues”).

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Amalga did not raise the Supremacy Clause argument before LIRC and, therefore, is precluded from raising it on appeal. See *Omernick v. DNR*, 94 Wis. 2d 309, 312, 287 N.W.2d 841 (Ct. App. 1979). All issues should be raised at the administrative level for full development of the parties’ arguments.

¶3 In its decision, LIRC did not make a finding whether Gomez-Sandoval was an undocumented worker. Rather, it addressed Amalga's arguments regarding the application of the Immigration Act. The trial court also did not address the issue of whether Gomez-Sandoval was an undocumented worker and only addressed the application of the Immigration Act. Both LIRC and the trial court held that the Immigration Act did not bar Gomez-Sandoval's claim for back wages.

¶4 The threshold issue as to whether the Immigration Act even applies in this case is whether Amalga met its burden of showing Gomez-Sandoval is an undocumented worker. If Gomez-Sandoval is not an undocumented worker, then the Immigration Act has no application in this case. LIRC failed to resolve this issue. In fact, in its decision, LIRC expressly states, "[a]part from the question of whether ... [the Immigration Act applies], this case poses a very real question as to whether [Amalga]—who would have the burden of proof on this issue—has shown that [Gomez-Sandoval] actually is an undocumented worker." All the parties acknowledge that neither the ALJ nor LIRC made a finding whether Amalga met its burden of showing Gomez-Sandoval was an undocumented worker.

¶5 This court concludes that, a factual finding must be made regarding whether Gomez-Sandoval is, in fact, an undocumented worker or whether LIRC cannot make such a factual finding based on Amalga's failure to meet its burden of proof, prior to considering whether the Immigration Act bars Gomez-Sandoval's claim under WIS. STAT. § 102.35(3). This court on review must give LIRC's factual findings great deference. Therefore, this factual finding is required for our review. If Gomez-Sandoval is not an undocumented worker, then the

Immigration Act does not apply in this case and the Immigration Act issues should not be addressed.

¶6 “The reviewing court may not substitute its judgment for that of an agency in a contested case as to the weight of evidence on any disputed finding of fact.” *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶27, 264 Wis. 2d 200, 664 N.W.2d 651. *See also Connecticut Gen. Life Ins. Co. v. DILHR*, 86 Wis. 2d 393, 405, 273 N.W.2d 206 (1979). Therefore, because LIRC did not make a finding, based on the evidence presented at the hearing, whether Amalga met its burden of proof that Gomez-Sandoval was an undocumented worker or in the alternative whether it could not make such a finding, we reverse the trial court’s order and remand the matter to the trial court with directions to remand this case to LIRC for such a determination.

BACKGROUND

¶7 Gomez-Sandoval claims that Amalga, her employer, unreasonably refused to rehire her after she recovered from a work-related injury. Gomez-Sandoval’s doctor released her to return to work, without restrictions, on December 12, 2012. Because Gomez-Sandoval was not rehired, she filed a hearing application on July 9, 2013, alleging an unreasonable refusal to rehire. Gomez-Sandoval sought back wages for the period from December 12, 2012 through July 28, 2013.

¶8 On July 17, 2013, Gomez-Sandoval got a call from Amalga saying there was work for her and she returned to work at Amalga on July 29, 2013. After about one month, Amalga notified Gomez-Sandoval that there was an issue with the validity of her social security number. Amalga gave Gomez-Sandoval thirty

days to address the issue. When she did not correct the issue, Amalga terminated her employment.

¶9 At the hearing before the ALJ, Amalga introduced testimony to support its argument that it did not learn that Gomez-Sandoval was released to return to full duty until July 22, 2013. Additionally, Amalga introduced testimony to explain why Gomez-Sandoval was ultimately terminated after she was recalled to work—the issue regarding her social security number. The testimony included a witness who explained that, as part of being recalled after being off work for a protracted period of time, Amalga required Gomez-Sandoval to complete an I-9 form.³ Gomez-Sandoval submitted a completed I-9 form to Amalga on August 1, 2013, and provided Amalga with a copy of an expired Wisconsin driver’s license and a social security card with her name on it.

¶10 Amalga then checked the Social Security Number Verification System to verify the social security number that Gomez-Sandoval provided on the I-9 form. Amalga’s witness testified that the results showed that “the [s]ocial [s]ecurity number failed.” The witness “asked” Gomez-Sandoval to visit the Social Security Administration office in order to clear up any discrepancies about her social security number and gave her thirty days to do so. Gomez-Sandoval did not resolve any of the discrepancies, did not return to Amalga or communicate with Amalga further. Thereafter, Amalga terminated her employment.⁴

³ An I-9 form is the Employment Eligibility Verification Form that the Immigration Act requires to be filled out by any employee hired after November 6, 1986. *See* 8 U.S.C. § 1324a(b)(2); 8 C.F.R. § 274a.2(a)(2), (b)(1)(i).

⁴ The issue of the termination of Gomez-Sandoval’s employment is not before this court.

¶11 The ALJ rejected Amalga’s argument that it did not know that Gomez-Sandoval was released to full duty work before July 22, 2013.⁵ The ALJ found that Amalga unreasonably refused to rehire Gomez-Sandoval and was liable to her for lost wages from the period of time when Gomez-Sandoval was released to return to full duty and the date she was recalled to work. Related to the issue of whether Gomez-Sandoval was an undocumented worker, the ALJ noted that “[Gomez-Sandoval] had been working for one month when ... she was notified that there was an issue with the validity of her social security number. [Gomez-Sandoval] was given [thirty] days to address this issue. [Gomez-Sandoval] did not correct this issue and her employment was terminated.”

¶12 In summary, the ALJ went on to state that “[a]fter reviewing the evidence on the record and listening to the testimonies of [Gomez-Sandoval] and [Amalga’s] witnesses, I find that [Gomez-Sandoval] was unreasonably refused employment at [Amalga] in violation of section 102.35(3) of the Wisconsin Statutes. In coming to this decision, I relied heavily on the testimony of the witnesses.” Additionally, the ALJ found that “[a]s for [Amalga’s] witnesses, both Mr. [John] Deluka and Ms. [Rochelle] Webber[-Wojcynski] failed to establish that there [was] a good cause for not rehiring [Gomez-Sandoval].” The ALJ did not specifically state whether Gomez-Sandoval was an undocumented worker or not.

¶13 Amalga petitioned LIRC for review of the ALJ’s decision arguing that there was legitimate doubt as to whether Amalga was aware that Gomez-Sandoval could return to work prior to July 2013 and that Gomez-Sandoval’s claim for back wages was barred by the Immigration Act because she was an

⁵ Amalga does not appeal this finding.

undocumented worker. LIRC affirmed the ALJ's decision on the grounds that Gomez-Sandoval proved that Amalga unreasonably refused to rehire her following a work-related injury. LIRC then found that the Immigration Act did not bar Gomez-Sandoval's claim for back wages. As noted above, LIRC did not make a finding whether Gomez-Sandoval in fact was an undocumented worker or whether Amalga met its burden of showing Gomez-Sandoval was an undocumented worker. In footnote six of its decision LIRC noted:

[T]his case poses a very real question as to whether [Amalga]—who would have the burden of proof on this issue—has shown that [Gomez-Sandoval] actually is an undocumented worker. While [Amalga] offers a Social Security Administration report stating the social security number did not match [Gomez-Sandoval's] name, that does not necessary [sic] prove that [Gomez-Sandoval] was an undocumented worker.

[Gomez-Sandoval] herself never testified that she was an undocumented worker. [Amalga's] attorney did ask [Gomez-Sandoval]: "Are you able at this time to provide proper document [sic] in regard to your employment?" However, when [Gomez-Sandoval]'s attorney questioned the relevance of that question, [Amalga's attorney] withdrew it.

¶14 Amalga petitioned the trial court for review of LIRC's decision. The trial court noted that neither the ALJ nor LIRC had made a finding regarding whether Gomez-Sandoval was an undocumented worker. However, rather than remand to LIRC for such a determination, the trial court affirmed LIRC's decision on the grounds that the Immigration Act did not bar Gomez-Sandoval's claim for back wages. The trial court made no further mention of the issue of whether Gomez-Sandoval was an undocumented worker. This appeal followed.

DISCUSSION

The Issue of Whether Gomez-Sandoval is an Undocumented Worker or Whether Amalga Failed to Meet its Burden of Proof Must be Resolved Before Addressing Whether the Immigration Act Issues Bar her Claim for Back Wages.

¶15 “When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court.” *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶25, 335 Wis. 2d 47, 799 N.W.2d 73 (citation omitted). However, it is unclear from the record whether the ALJ found that Amalga failed to meet its burden of proof to show that Gomez-Sandoval was an undocumented worker. Moreover, as noted above, LIRC’s decision states that “this case poses a very real question as to whether [Amalga] has shown that ... [Gomez-Sandoval] actually is an undocumented worker.”

¶16 At the hearing before the ALJ, Amalga introduced testimony that: (1) there was a discrepancy with Gomez-Sandoval’s social security number on the I-9 form; (2) Gomez-Sandoval did not correct the discrepancy; and (3) she did not contact Amalga after being given thirty days to correct the discrepancy. In the decision, the ALJ noted that Gomez-Sandoval “was notified that there was an issue with the validity of her social security number,” she did not correct the issue and her employment was terminated. However, the ALJ also specifically found that Amalga’s witnesses failed to establish that there was a good cause for not rehiring Gomez-Sandoval. The ALJ then stated, “[a]fter reviewing the evidence on the record and listening to the testimonies of [Gomez-Sandoval] and [Amalga’s] witnesses, I find that [Gomez-Sandoval] was unreasonably refused employment at [Amalga] in violation of section 102.35(3) of the Wisconsin Statutes.” The ALJ’s decision is unclear as to whether the ALJ’s determination

included a conclusion that Amalga had not met its burden of proving that Gomez-Sandoval was an undocumented worker.

¶17 Under the facts of this case, LIRC correctly states that Amalga had the burden of proof to show that it had reasonable cause for its refusal to rehire Gomez-Sandoval. See *deBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶43, 335 Wis. 2d 599, 804 N.W.2d 658. In its decision, LIRC noted that the social security number did not match Gomez-Sandoval's name and stated that does not necessarily prove she was an undocumented worker. LIRC also noted that Gomez-Sandoval did not testify that she was an undocumented worker and when Amalga's attorney asked her if she had proper documentation for her employment, Gomez-Sandoval's attorney objected, and the question was withdrawn. However, rather than make a finding whether Amalga had met its burden of proof to show that Gomez-Sandoval was, in fact, an undocumented worker, LIRC merely stated that "this case poses a very real question as to whether [Amalga]—who would have the burden of proof on this issue—has shown that [Gomez-Sandoval] actually is an undocumented worker."

¶18 On appeal, LIRC, Gomez-Sandoval, and Amalga acknowledge that LIRC failed to make a finding regarding whether Gomez-Sandoval was an undocumented worker. In its brief, Amalga states that "LIRC specifically declined to make a factual finding as to whether or not [Gomez-Sandoval] was an undocumented worker." At several points in its brief, LIRC makes the same argument and states, "[i]n sum, neither [LIRC] nor the ALJ found that Gomez-Sandoval was an unauthorized alien or undocumented worker. [LIRC] expressly questioned the sufficiency of the evidence on that point."

¶19 Moreover, LIRC argues that because the record does not support the finding that Gomez-Sandoval was an undocumented worker, the Immigration Act is not relevant in this case. However, it is LIRC that failed to make any finding whether Amalga had presented sufficient evidence to prove that Gomez-Sandoval was, in fact, an undocumented worker. While that is a legal conclusion we could review, the record is silent on LIRC's *factual* finding of whether Gomez-Sandoval is undocumented or, in the alternative, whether LIRC concludes there was insufficient proof from Amalga to meet its burden. Without those findings, this court cannot determine whether the Immigration Act applies to this case.

¶20 Courts should decide cases on the narrowest possible grounds and should not reach constitutional issues if they can dispose of the appeal on other grounds. *See Miesen v. DOT*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999); *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). As a consequence, unless it is determined that Amalga has met its burden of establishing that Gomez-Sandoval is an undocumented worker, this is not the appropriate case to address whether Gomez-Sandoval's claim for benefits pursuant to WIS. STAT. § 102.35(3) is: (1) barred as a matter of law because payment of back wages would violate the Immigration Act; and (2) whether the Immigration Act bars such a claim.

CONCLUSION

¶21 In conclusion, because LIRC did not make a finding whether Amalga met its burden of proof that Gomez-Sandoval was an undocumented worker, we reverse the trial court's order and remand the matter to the trial court with directions to remand this matter to LIRC to make such a determination. *See Connecticut Gen. Life Ins. Co.*, 86 Wis. 2d at 405. We are not directing that

LIRC must reopen the hearing before the ALJ because as noted, the record reflects that there was testimony at the hearing on this issue.

¶22 Because LIRC failed to make the necessary factual finding whether Amalga established that Gomez-Sandoval was an undocumented worker, the issue of whether back wages under WIS. STAT. § 102.35(3) for an unreasonable refusal to rehire an undocumented worker is barred by the Immigration Act is not properly presented in this case. Therefore, this court will not address that issue until it is squarely presented in an appropriate case.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(5).